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IN THE

Supreme Court of the United States

October Term, 1963

No. 141

PAUL JOHN CARBO,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Rehearing of Denial of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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This is a petition for rehearing of this Court's order of June 1, 1963 denying the petition for writ of certiorari and is filed pursuant to Rule 58(2) of the Rules of this Court.

Intervening circumstances of substantial effect have occurred subsequent to the filing of the Petition, the Supplement thereto and the Reply to the Brief for the United States in opposition.

The circumstances are these:

1. *Ferguson v. United States*, No. 198, Oct. Term, 1963 (No. 1170, Oct. Term, 1962), discussed in petitioner's Supplemental Petition (pp. 7-8) was remanded by this Court on January 6, 1964 on motion of the United States on a point not presented in the petition for writ of certiorari in that case, namely, whether the

right to cross-examination had been abridged. (..... U. S. ....., 32 U. S. L. W. 3243). Accordingly, the telephonic induction coil eavesdropping question which was present in the petition in that case and which is present here, has not been decided. The reasons which appealed to this Court in granting certiorari in *Ferguson* are, therefore, still cogent and should be ground for the grant of certiorari herein.

2. *Massiah v. United States*, discussed in the Supplement to petitioner's Petition for Writ of Certiorari herein (pp. 4-7), decided by this Court on May 18, 1964 (No. 199, Oct. Term, 1963, ... U. S. ....., 32 U. S. L. W. 4389), was decided on a point other than the question of surreptitious electronic eavesdropping by a governmental agent not known to be such by the defendant. Hence that question, present in that case, as in the instant one, and left open in *Lopez v. United States*, 373 U. S. 427 (discussed in the Supplement to Petition for Writ of Certiorari herein [pp. 8-15]) is still undecided. Hence the present case is an appropriate one for the grant of certiorari.

3. The continued, pervasive and unlawful, as we say, use of evidence obtained by electronic eavesdropping is an ever-present one, constantly being presented to this and other courts and one which calls for a definite pronouncement by this Court. For example, subsequent to the filing of the Petition and Supplement to Petition for Writ of certiorari:

a. This Court, on May 6, 1964, reversed *Clinton v. Virginia*, No. 294, Oct. Term, 1963, ... U. S. ..... 32 U. S. L. W. 4387. From the Court's citation of *Silverman v. United States*, 365 U. S. 505, and from

the concurring opinion of Mr. Justice Clark, it appears that the basis of the Court's decision was that there had been a "trespass" similar to that which had occurred in *Silverman*. However, as we understand the facts from a reading of the opinion of the Virginia Supreme Court (204 Va. 275, 130 S. E. 2d 437), the penetration into the wall was minute and could scarcely be said to have gone half way through the wall as apparently was the case in *Silverman* so as to justify a finding of "trespass." The description of the Virginia Supreme Court (130 S. E. 2d at 442) was that the device "was not driven into the wall, but was 'stuck in' it," and that "the penetration was very slight such as one made by a thumb tack to hold the small device in place." In truth, we respectfully suggest, *Clinton* casts grave doubt as to the present standing of *Goldman v. United States*, 316 U. S. 129, a doubt sufficient, we submit, to call for the grant of certiorari herein and a re-examination of the constitutionality of electronic eavesdropping.

b. The United States Court of Appeals for the Fifth Circuit, in *Cullins v. Wainwright*, 328 F. 2d 481, found it necessary on February 14, 1964 to reverse a District Court which, along with the Florida state courts, had held not violative of the right to freedom from unreasonable search, evidence obtained by the lowering of a microphone from one apartment down the air shaft so that the microphone was opposite the air shaft leading to the apartment below. Up to this point, the prosecution had successfully argued (p. 482) "that there has been no invasion or penetration of the apartment of Cross, and hence no rights were infringed."

c. In *United States v. Laughlin*, 222 F. Supp. 264, the United States District Court for the District of Columbia pointed out on October 8, 1963 (p. 265) "that neither the Supreme Court nor the Court of Appeals for this circuit has squarely passed upon the admissibility of such evidence." (a recording obtained by means of an induction coil attached to the telephone with the consent of one of the parties). And in the retrial of that case (223 F. Supp. 623), the court squarely held (p. 626) "that where a [telephone] conversation is recorded, regardless of the methods or the means used, without the consent of one of the parties, the right of privacy has been violated"—also, §605 of the Federal Communications Act (47 U. S. C. A. 605) has been violated.

This holding is, of course, directly in conflict with the case at bar.

d. And in *United States v. Tane*, 329 F. 2d 848; a divided Second Circuit Court of Appeals held that a "sender" within the meaning of §605 of the Federal Communications Act included the "receiver" of a telephone call on a phone not listed in the defendant's name and where the defendant was not on the wire the whole time of the conversation.

4. On May 4, 1964, this Court in *Coleman v. Alabama*, ... U. S. ....., 32 U. S. L. W. 4384, ruled that the refusal of the opportunity to make a showing of systematic exclusion of Negroes from the jury required reversal. Similar refusal of opportunity is present in the case at bar. See Petition for Writ of Certiorari in *Gibson v. United States*, No. 145, Oct. Term, 1963, pp. 21-22. By like token, therefore, certiorari should

be granted in the instant case. See also *Arnold v. North Carolina*, ... U. S. ....., 32 U. S. L. W. 4340, April 6, 1964.

5. Petitioner adopts, so far as applicable, the points made in the petitions for rehearing filed, or to be filed, in the companion cases of *Palermo v. United States*, No. 122, *Sica v. United States*, No. 134 and *Gibson v. United States*, No. 145, all, October Term, 1963.

Conclusion.

The Petition for rehearing and the petition for writ of certiorari should be granted.

Respectfully submitted.

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Attorneys for Petitioner.

Certificate.

I certify that the within Petition for Rehearing is presented in good faith and not for delay and that the Petition is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

FRED OKRAND

Dated: June 16, 1964.